IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2007-0123-PR
Respondent,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
RUPERT RAY DIXON,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20032363

Honorable Virginia C. Kelly, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri
Tucson
Attorneys for Petitioner

E S P I N O S A, Judge.

¶1 Following a jury trial held in his absence, petitioner Rupert Ray Dixon was convicted of offering to sell a narcotic drug. Dixon admitted he had two prior felony convictions, and the trial court sentenced him to a partially mitigated, twelve-year prison term. We affirmed Dixon's conviction and sentence on appeal. *State v. Dixon*, No. 2 CA-

CR 2004-0279 (memorandum decision filed Nov. 30, 2005). Dixon then sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S., claiming both trial and appellate counsel had been ineffective, an argument he supported with an affidavit by a defense attorney. The trial court found Dixon had failed to state a colorable claim and denied relief without conducting an evidentiary hearing. This petition for review, in which Dixon asks that his conviction be reversed, followed. We will not disturb a trial court's grant or denial of post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 The underlying conviction arose from an incident involving Dixon's agreement to sell crack cocaine to an undercover police officer in exchange for $40 plus a $5 fee for procuring the drug. The evidence at trial, viewed in the light most favorable to sustaining the convictions, *see State v. Marshall*, 193 Ariz. 547, ¶ 3, 975 P.2d 137, 138 (App. 1998), established the following. The officer paid Dixon the full amount after telling Dixon he did not want Dixon to "rip [him] off" by failing to return with the drugs. Dixon took the money and never returned; another officer located Dixon eight days later in the same area, and the undercover officer then identified him. Dixon was a "trapper," an addict who acts as a "middleman" in a narcotics sale. Typically, a trapper will go to the drug source with the purchaser's money in hand, obtain the drugs, and return to the buyer's vehicle having already "chipped off" a portion of the drugs for his or her personal use.

¶3 Dixon argues, as he did below, that trial counsel was ineffective for failing to call an expert to rebut the state's evidence of his intent to sell narcotic drugs to the undercover officer and that trial counsel failed to request a specific jury instruction on intent. To present a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient under prevailing professional norms and the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227 (1985).

¶4 Section 13-3408(A)(7), A.R.S., the statute under which Dixon was convicted, provides that "[a] person shall not knowingly . . . offer to sell . . . a narcotic drug." The statute does not require a showing of intent, only that the defendant *knowingly* offered to sell the drug. In *State v. Strong*, 178 Ariz. 507, 508, 875 P.2d 166, 167 (App. 1993), we addressed this very issue and found that, because the current version of § 13-3408(A)(7) requires proof that a defendant knowingly offered to sell a drug, "[t]here is thus no reason to read into the statute the additional requirement of proof of intent to sell." It was essentially on this basis that the trial court denied Dixon's claim of ineffective assistance of trial counsel.

¶5 In *State v. Alvarado*, 178 Ariz. 539, 542, 875 P.2d 198, 201 (App. 1994), Division One of this court found that, "[t]o commit the crime of offering to sell . . . a person must be aware or believe that he has made an offer to sell the substance, not that he has told

a lie or made a joke." Although Division One found sufficient evidence to support a conviction of Alvarado's offer to sell, it reversed the conviction and remanded the case for a new trial because the state had incorrectly asserted that an offer to sell drugs is a strict liability offense, and it was unclear whether the trial court, which was the trier of fact, had relied on that alternative theory in finding Alvarado guilty. *Id*. at 543-44, 875 P.2d at 202-03. Although intent is not an element of the offense before us, as Division One noted in *Alvarado*, in order to be convicted of this offense, a defendant must actually mean to offer to sell the drugs, rather than defraud the buyer.

¶6 Here, the jury was given the following relevant instructions:

> The crime of offering to sell a narcotic drug requires proof that the defendant knowingly offered to sell a narcotic drug.
>
> The law does not require that a delivery be made in order to prove that an offer to sell was made.
>
> Sale or sell means an exchange of anything of value, present or prospective.
>
> Knowingly means that a defendant acted with awareness of the existence of conduct or circumstances constituting an offense. It does not mean that a defendant must have known that the conduct is forbidden by law.

¶7 Like the jury in *Strong*, the jury here "was properly instructed that it must find that appellant [had] acted 'knowingly,' and was given the statutory definition of that term." *Strong*, 178 Ariz. at 508, 875 P.2d at 167. The term "knowingly," as defined in A.R.S. § 13-105(9)(b), requires that a defendant "is aware or believes that his or her conduct" is that

described by the offense. Dixon argues that trial counsel should have presented evidence that trappers often *act* as if they intend to sell drugs while they really intend to steal the potential buyer's money and obtain drugs for themselves. Specifically, he claims trial counsel should have presented the expert testimony of a former law enforcement officer to rebut the state's testimony that a trapper's offer to sell is usually sincere. However, as the state pointed out in its response to the petition for post-conviction relief, "[t]he issue of trappers stealing money from prospective drug buyers was addressed several time[s] by more than one witness," an argument the record supports. Three police officers experienced in working with narcotics cases, one of whom was the undercover officer in this matter, independently testified at trial that a trapper's offer to sell is not always sincere.

¶8 On appeal, we found that the undercover officer had testified about "his extensive experience in conducting investigations of illegal drug sales and about behavior related to drug transactions. He also testified that he had been working undercover in an area known for such transactions." No. 2 CA-CR 2004-0279, ¶ 4. In addition, defense counsel argued in her closing argument that Dixon had not made a valid offer to sell drugs to the officer but rather that he had "[lied] about it as part of a theft." In light of the fact that the jury was presented with evidence that trappers do, at times, defraud drug buyers, in addition to defense counsel's argument to the jury in this regard, Dixon can hardly argue trial counsel was ineffective for having failed to present such evidence to the jury or that he was prejudiced as a result.

¶9 Moreover, on appeal, we rejected Dixon's claim that there was insufficient evidence he had intended to actually sell cocaine to the officer rather than merely take the money and leave. We found "[t]here was sufficient evidence that Dixon had offered to sell crack cocaine and that he had the requisite intent in doing so." No. 2 CA-CR 2004-0279, ¶ 4. We also concluded that, in light of the jury's having viewed a videotape of Dixon selling cocaine to another undercover officer just one month before the underlying incident occurred, evidence we concluded had been properly admitted, "reasonable jurors could have inferred that Dixon had offered to sell [the undercover officer in this matter] cocaine and that Dixon had intended to complete the transaction rather than to commit a theft." *Id*. Like the defendant in *Alvarado*, Dixon's defense that he had not intended to offer to sell the officer drugs was weakened by the evidence that he had made an offer to sell drugs on a different occasion. *Alvarado*, 178 Ariz. at 541, 875 P.2d at 200. We thus conclude the trial court correctly denied Dixon's claims of ineffective assistance of trial counsel.

¶10 Dixon also contends appellate counsel was ineffective for failing to challenge the absence of a specific jury instruction on intent, specifically, one telling the jury that the state was required to prove that his offer to sell was a serious one. Because we have previously held in *Strong* that such an instruction was not legally required, and because Dixon has not explained how our reasoning there was flawed, appellate counsel was not ineffective for failing to raise this argument on appeal. *Strong*, 178 Ariz. at 508, 875 P.2d at 167.

¶11 Dixon also argues appellate counsel should have challenged the absence of a jury instruction on theft as a lesser-included offense of an offer to sell, arguing "there was overwhelming evidence that Dixon [had] stole[n] $45.00" from the officer and that the failure to provide a theft instruction constituted reversible error. Having granted a judgment of acquittal on the charge of fraudulent scheme and artifice, the trial court correctly found that, because theft is not a lesser-included offense of an offer to sell drugs, the sole offense which was presented to the jury, it would have been error to provide a jury instruction on that offense. At trial, defense counsel agreed with the trial court that, without the greater fraudulent scheme and artifice offense, there was no basis upon which to instruct the jury on the lesser offense of theft. Counsel also noted that she intended to argue to the jury that Dixon should have been charged with the offense of theft rather than offer to sell, an argument she did in fact make. For all of these reasons, we conclude the trial court properly denied Dixon's claims of ineffective assistance of appellate counsel.

¶12 Accordingly, although we grant the petition for review, we deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge